

Study L-4000

May 3, 1996

## Memorandum 96-34

### Health Care Decisions: Preliminary Considerations

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This memorandum marks the beginning of the study on health care decisionmaking and discusses some basic issues concerning the possible scope of the study. Some background materials are also included— you should retain these items in your files for future reference:

1. Uniform Health Care Decisions Act (1993).
2. *Comparison of California Advance Health-Care Directive Law to the Uniform Health-Care Decisions Act* (memorandum prepared for the Commission by Cynthia Bradford, a third-year student at Stanford Law School).
3. 1995 *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 323 (1994) — the Commission's report on the Power of Attorney Law as enacted. (Included with Commissioners' copies only.)

Also attached as an exhibit is a letter from Antonia Graphos, Chair of the Incapacity Subcommittee of the State Bar Estate Planning, Trust and Probate Law Section, reaffirming the interest of the Section in working with the Commission on this study.

At the November 1995 meeting, the Commission restated its intention to consider health care decisions issues. In the early 1990s, when the Commission was working on its comprehensive revision of the power of attorney statutes, culminating in enactment of the Power of Attorney Law in 1994, Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section repeatedly urged the Commission to consider revision of the durable power of attorney for health care. In 1993, near the end of the Commission's study of powers of attorney for property and related issues, the National Conference of Commissioners on Uniform State Laws approved the Uniform Health-Care Decisions Act, and the State Bar Team urged the Commission to review it as part of the power of attorney study.

Substantive review of health care decisionmaking issues was deferred for consideration as the second part of the power of attorney study. This enabled

legislative enactment of the comprehensive restructuring of the power of attorney statutes without further delay and was also necessary in light of other legislative priorities.

The time has come for the Commission to consider the larger issues of the scope and priorities of this study so that the staff can begin work and interested persons and groups can marshal their efforts. We anticipate that expert practitioners and professional groups will raise a significant number of issues as they review the existing law. Following this meeting, the staff proposes to give notice of the commencement of the study and solicit proposals for revision of the law.

In terms of general scope, the staff proposes to consider three general areas: the law in other jurisdictions, the Uniform Health-Care Decisions Act, and inconsistencies and other problems in existing California law.

### **Review of More Recent Statutes in Other Jurisdictions**

California's durable power of attorney for health care was the first of its kind, enacted on Commission recommendation in its basic form in 1983. Many other states have enacted legislation dealing with the issue of health care decisionmaking since that time. It would be useful to review this body of law for useful ideas. Preliminary work has already been started — Matthew Waddell, a third-year law student at the University of Pennsylvania, has been collecting the statutes of other states, in his work through Penn's Public Service Program.

In this connection, Ms. Graphos, Chair of the Incapacity Subcommittee of the State Bar Estate Planning, Trust and Probate Law Section, writes that "practical aspects of health care decision making available in many states are notably absent in California." (See Exhibit p. 1.)

### **Review of Uniform Health-Care Decisions Act**

As noted above, the Uniform Health-Care Decisions Act (UHCDA) has been recommended for enactment in all the states. The Commission has a statutory duty to receive and consider proposals from the Uniform Law Commissioners. You may have noticed that one of the observers to the UHCDA drafting committee, Harley Spitler, was also a member of the State Bar Team that worked with the Commission on the Power of Attorney Law. The UHCDA should not simply be enacted in California without detailed review and revision necessary to coordinate it with existing provisions, including the durable power of attorney

for health care in the Probate Code and the Natural Death Act in the Health and Safety Code. Here, too, preliminary work has been done — Cynthia Bradford, a third-year Stanford law student, has prepared a useful catalog and analysis of the differences between the California law reflected in the durable power and the Natural Death Act and the new UHCDA, which is attached to this memorandum.

### **Coordination of Existing Statutes**

There are technical problems in the existing statutes and a lack of coordination between the durable power of attorney for health care and the Natural Death Act directive and other statutes. Some of these issues are explored in Ms. Bradford's memorandum. Ms. Graphos mentions the multiplicity of provisions in existing law and the potential for inconsistency and lack of cohesiveness. (See Exhibit p. 1.)

*Competency determinations.* Another issue that arose late in the power of attorney study concerns competency determinations. Commissioner's may recall that the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section urged the Commission in 1993 to adopt the capacity definition from the UHCDA for the purposes of the Power of Attorney Law. (See, e.g., Memorandum 94-2, Exhibit pp. 25-26.) The language of the UHCDA was found to be inappropriate for that general purpose. Since that time, there have been some changes in the law governing judicial determinations of competence which should be considered in this study. See Due Process in Competence Determinations Act, 1995 Cal. Stat. ch. 842.

*Technical problems within durable power of attorney for health care.* The durable power of attorney for health care statute as recodified in the new Power of Attorney Law in the Probate Code is nearly identical to its Civil Code predecessor. The Commission resisted making changes in this law while working on the comprehensive statute because it was much more highly developed than the general law relating to powers of attorney for property and because the issues are quite different, even though they overlap in some areas. One or two minimal revisions concerning execution of powers of attorney that the Commission recommended in the interest of uniformity had to be dropped when the bill encountered significant "concern" in legislative committee hearings. But these issues still remain. We know that some interest groups, such as the California Medical Association, have a number of technical issues they would

like to see addressed, and Ms. Graphos' letter suggests that the State Bar will be making numerous recommendations for revision.

As the Commission get into the study and we familiarize ourselves with the law and the issues, the staff will prepare memorandums on individual topics, such as execution and witnessing requirements, competency determinations, scope of surrogate decisionmaking, enforcement of directives, and the like, drawing from relevant law in California as well as other jurisdictions and the uniform act, where relevant. No doubt we will receive proposals from the bar and others that open up new issues. If the study threatens to become too broad, of course, the Commission will need to limit it to what can reasonably be accomplished in the Legislature. But at this point, as we are soliciting input from interested persons, the staff would not try to anticipate what matters are appropriate.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary